INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Date of the decree and application for appeal	2
Nature of the case and rulings below	2
Cases believed to sustain jurisdiction	3
Appendix "1"—Findings of fact and conclusions of law	5
Appendix "2"—Per curiam decision of the District Court	8

Table of Cases Cited.

Atlantic Coast Line R. Co. v. *United States*, 284 U. S. 288	3
Ches. & Ohio Ry. Co. v. *United States*, 283 U. S. 35	3
Chicago Junction Case, 264 U. S. 258	3
New York Central Securities Co. v. *United States*, 287 U. S. 12	3
United States v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 282 U. S. 311	3

Statutes Cited.

Commerce Court Act, Section 5 (c. 309, 36 Stat. 539, U. S. Code, Suppl. 111, Tit. 28, Sec. 45a)	1
Judicial Code, Section 238, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, par. (d); U. S. Code, Tit. 28, Sec. 345	2
Motor Carrier Act of 1935	2
Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; U. S. Code, Tit. 28, Sec. 45 and 47a, Suppl. 111)	2

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MINNESOTA,
THIRD DIVISION

Civil Action No. 253

ERNEST E. MOORE, DOING BUSINESS AS MOORE MOTOR FREIGHT LINES,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

STATEMENT AS TO JURISDICTION ON APPEAL.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Ernest E. Moore, doing business as Moore Motor Freight Lines, appellant, submits herewith his statement showing the basis of the jurisdiction of the Supreme Court of the above entitled case on appeal.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the final decree complained of is conferred by:

Section 5 of the Commerce Court Act (c. 309, 36 Stat. 539; U. S. Code, Suppl. 111, Tit. 28, Sec. 45a);

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. (d); U. S. Code, Tit. 28, Sec. 345);

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; U. S. Code, Tit. 28, Sec. 45 and 47a, Suppl. III).

B. The final decree sought to be reviewed was entered November 17th, 1941. The petition for appeal was filed and the Order allowing the appeal was entered November 29th, 1941.

C. Plaintiff, a common carrier by motor vehicle, subject to the Motor Carrier Act, 1935, and to the jurisdiction of the Interstate Commerce Commission thereunder, brings this suit to set aside the Commission's order of June 9th 1941, effective December 1st, 1941, which denied the plaintiff the right, under the Grandfather Clause of said Act, to operate as a common carrier, or, in the alternative a contract carrier, or otherwise, as applied for before the Interstate Commerce Commission under his application designated as: MC-17481, MC-19693, MC-21231, MC-24697 and MC-80532.

After said denial by the Interstate Commerce Commission of the applications of the plaintiff, the plaintiff filed a suit on the 8th day of July, 1941, praying that the Court annul and enjoin the Commission's order of June 9th, 1941, on the principal grounds that:

1. The order of the Commission both deprives petitioner of his property without, and denies him, due process of law, and is fatally repugnant to and in conflict with the Fifth Amendment to the Constitution of the United States and the statute in that it is premised upon matter and information foreign to and outside of the record.

2. The finding that petitioner allegedly had not leased equipment and that it had not been operated under his direction and control, failed utterly and com-

pletely to sustain the Commission's conclusion that for such reason petitioner was not a common carrier in that the statute imposes no such conditions. Beyond that, the conclusion respecting leasing of equipment does not follow from, nor is it sustained by the circumstances and facts stated and relied upon by the Commission. The order is void as being premised upon conditions wholly inadequate in law to support it.

3. The order and the Commission's ultimate conclusion are both without factual integrity and neither are sustained by the primary findings of fact made by the Commission. The order is contrary to the law and the evidence in that the Commission failed to heed and recognize affirmative statutory mandates and gave effect to the legal significance of its findings and the evidence.

4. The answers of the United States and the Interstate Commerce Commission denied the material allegations of the complaint.

Final hearing was held before a statutory court of three judges on the 23rd day of September, 1941, and findings of fact, conclusions of law and final decree were filed on November 17th, 1941, holding the Commission's order valid and denying the relief sought.

D. The questions presented are substantial and of public importance.

E. The following cases sustain the jurisdiction of the Supreme Court to review the decree of the District Court:

Atlantic Coast Line R. Co. v. *United States,* 284 U. S. 288;

Chicago Junction Case, 264 U. S. 258;

Ches. & Ohio Ry. Co. v. *United States,* 283 U. S. 35;

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 282 U. S. 311;

N. Y. Central Securities Co. v. *United States,* 287 U. S. 12;

United States v. *Maher,* 307 U. S. 148.

Copy of the findings of fact, conclusions of law and final decree entered by the District Court are appended hereto.

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Of Counsel.

APPENDIX "1".

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION.

No. 253 Civil.

ERNEST E. MOORE, Doing Business as Moore Motor Freight Lines, *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Findings of Fact and Conclusions of Law.

This cause came on to be heard before a statutory court consisting of John B. Sanborn, United States Circuit Judge, Robert C. Bell, United States District Judge, and George F. Sullivan, United States District Judge (28 U. S. C. A., 41(28), 43, 48), upon the application of the plaintiff for a temporary injunction to restrain the enforcement of an order of the Interstate Commerce Commission denying the plaintiff certificates of convenience and necessity under the so-called "grandfather" clause of Section 206 (a) of the Motor Carrier Act of 1935 (49 U. S. C. A. 306 (a)).

Mr. Thomas W. Walsh appeared as attorney for the plaintiff;

Mr. S. R. Brittingham, Jr., Special Assistant to the Attorney General, appeared for the United States of America, and

Mr. Allen Crenshaw, Attorney, Interstate Commerce Commission, appeared for the Interstate Commerce Commission.

At the hearing, the evidence taken before the Commission was introduced in evidence, together with all orders made and entered by the Commission. The case, upon the stipulation of parties in open court, was submitted for final decree and determination.

The Court, being fully advised in the premises, and pursuant to Rule 52 of the Rules of Civil Procedure, makes the following findings of fact and conclusions of law:

Findings of Fact.

I.

The plaintiff, Ernest E. Moore, doing business as Moore Motor Freight Lines, on February 12, 1936, filed with the Commission four applications under the "grandfather" clause of Section 206 (a) of the Motor Carrier Act of 1935 (49 U. S. C. A., 306 (a)), seeking certificates of public convenience and necessity, or a permit authorizing continuance of operation (1) in MC-17481, as a common or contract carrier by motor vehicle between Minneapolis and St. Paul, Minnesota, and Chicago, Illinois, over two regular routes, one through Madison, Wisconsin, and the other through Rochester, Minnesota, and Waterloo, Cedar Rapids and Clinton, Iowa; and between points in Minnesota, Iowa, Wisconsin and Illinois, over numerous specified routes; (2) in No. MC-21231, as a common or contract carrier between points in Minnesota and points in Wisconsin, Illinois, Nebraska, Iowa, North Dakota and South Dakota, over undescribed regular and irregular routes; (3) in Nos. MC-19693 and MC-24697, applicant seeks authority embraced in whole or in part within the two above referred-to applications.

By application under Section 211 of the Motor Carrier Act (49 U. S. C. A., Section 311) in No. MC-80532, filed on February 12, 1936, plaintiff applied for a license authorizing operation as a broker for the purpose of arranging transportation of general commodities by rail, water and motor vehicle. This last application, however, was abandoned, and no evidence was adduced bearing thereon.

II.

After hearing, the Commission found that the applicant had failed to establish that he was, on the statutory date and continuously thereafter, in bona fide operation in interstate or foreign commerce as a common or contract carrier

by motor vehicle between any points whatsoever, on the ground that the plaintiff had failed to meet the burden of proof imposed upon him with respect to his applications for authority, and that the operations of the ownerdrivers could not be used in determining plaintiff's operating rights, and any rights which he might be entitled to necessarily rested on the operation of the Davis equipment, and that there was a failure of proof to show what shipments, if any, were transported in that equipment, and further, that there was a substantial interruption in the operation of the Davis equipment after the statutory date.

III.

The plaintiff filed a petition for a reconsideration by the Commission, which petition was denied.

IV.

At the hearing in this case, plaintiff introduced in evidence a certified copy of the record before the Commission upon which the order under review was based.

Conclusions of Law.

I.

The Commission's report and order of March 13, 1941, were made after a full hearing.

II.

The findings of fact upon which the order is based are supported by substantial evidence.

III.

The Commission's order is supported by the findings of fact.

IV.

The Commission's construction of the pertinent provisions of the Act is correct and the order is valid.

V.

The complaint should be, and is hereby dismissed for want of equity.

Dated this 17th day of November, 1941.

JOHN B. SANBORN,
United States Circuit Judge.
ROBERT C. BELL,
United States District Judge.
GEORGE F. SULLIVAN,
United States District Judge.

APPENDIX "2".

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION.

No. 253 Civil.

ERNEST E. MOORE, doing business as Moore Motor Freight Lines, *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

Decision.

Per Curiam.

This is a statutory suit (28 U. S. C. A. 41 (29), 43, 48) to set aside and permanently enjoin the enforcement of an order of the Interstate Commerce Commission, entered on March 13, 1941, in a proceeding before it, wherein plaintiff was the applicant, entitled, "No. MC-17481 et al., filed February 12, 1936, Ernest E. Moore, common carrier applications". Interlocutory judgment has been applied for. At the hearing upon this application the evidence taken before

the Commission was introduced in evidence, and the case, upon stipulation of the parties in open court, has been submitted for final decree.

The plaintiff in his complaint alleges that he was, on June 1, 1935, and continuously thereafter has been a carrier by motor vehicle, engaged in bona fide operation over the public highways in the State of Minnesota, Wisconsin, Illinois, Nebraska, Iowa, South Dakota and North Dakota, transporting goods for the general public and for specific contract shippers; that he is and was entitled to have issued to him under the provisions of the Motor Carrier Act of 1935 (49 U. S. C. A., Section 306 (a)), a certificate authorizing him to continue his operations as a motor carrier. His applications, seeking certificates of authority to operate as a common carrier, contract carrier, irregular common carrier, or as a broker for the transportation of goods in interstate commerce, were filed with the Commission on or about February 12, 1936. After a hearing before the Commission, and on March 13, 1941, said applications were denied. Application for a reconsideration of the March 13th order was likewise denied. The complaint alleges further that the Commission improperly construed the Motor Carrier Act, that the defendant Commission, in making its report and conclusions, acted arbitrarily and unlawfully, and in conflict with the evidence before it; that the proof submitted by the plaintiff clearly shows that he is entitled to certificates as a common carrier over the routes set forth in his applications. Plaintiff prays that the orders of the Commission denying his applications for authority to continue his operations as a motor carrier be set aside, that defendants be restrained from prosecuting the plaintiff for alleged violations of the Motor Carrier Act, and for such other relief as may be proper in the premise.

The defendants in their answers admit that the plaintiff applied to the Commission for certificates of public convenience and necessity, that hearings were held, evidence taken in the matter of said applications, and that the Commission made orders denying petitioner's applications; that an application by plaintiff for a reconsideration of said orders was likewise denied. The defendants deny that the Commission improperly construed said Motor Carrier Act,

that it acted arbitrarily, unlawfully and in conflict with the evidence before it, and that the proof submitted by the plaintiff entitles him to certificates of authority to operate as a common carrier, and pray that the action of the plaintiff be dismissed.

The plaintiff contends in his oral and written arguments that (1) the orders of the Commission deprive the plaintiff of his property without, and deny him, due process of law in that the orders are based upon matters foreign to, and outside of the record; (2) that the findings of the Commission are not supported by substantial evidence; (3) that the orders and ultimate conclusions of the Commission are not supported by facts, or the primary facts, as found by the Commission; (4) that the Commission's denial of plaintiff's motion for rehearing before it was arbitrary and unreasonable.

Section 206 (a) of the Motor Carrier Act of 1935 (49 U. S. C. A., Section 306 (a)) provides that no common carrier by motor vehicle shall engage in interstate or foreign commerce without a certificate of convenience and necessity issued by the Commission. However, it is provided in said section that if any such carrier was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and continued said operation since that time, the Commission should issue such certificate without requiring further proof of public necessity or convenience. This last referred-to provision is known as the "grandfather" clause.

It appears that the plaintiff, on February 12, 1936, filed with the Commission four applications under the "grandfather" clause of said Motor Carrier Act, seeking certificates of public convenience and necessity, or a permit authorizing continuance of operation: (1) in MC-17481, as a common or contract carrier by motor vehicle between Minneapolis and St. Paul, Minnesota, and Chicago, Illinois, over two regular routes, one through Madison, Wisconsin, and the other through Rochester, Minnesota, and Waterloo, Cedar Rapids and Clinton, Iowa; and between points in Minnesota, Iowa, Wisconsin and Illinois, over numerous specified routes; (2) in No. MC-21231, as a common or contract carrier between points in Minnesota and points in Wisconsin, Illinois, Nebraska, Iowa, North Dakota and South Dakota,

over undescribed regular and irregular routes; (3) in Nos. MC-19693 and MC-24697, applicant seeks authority embraced in whole or in part within the two above referred-to applications.

By application under Section 211 of the Motor Carrier Act (49 U. S. C. A., Section 311) in No. MC-80532, filed on February 12, 1936, plaintiff applied for a license authorizing operation as a broker for the purpose of arranging transportation of general commodities by rail, water and motor vehicle. This last application, however, was abandoned, and no evidence was adduced bearing thereon. The plaintiff, before the Commission, limited his applications to authority to operate over the routes set out in said applications in the States of Minnesota, Iowa, North Dakota, South Dakota, Wisconsin and Illinois. The applications were heard on a consolidated record.

The facts may be summarized as follows: Plaintiff in 1906 became engaged in the local cartage business in St. Paul and Minneapolis, Minnesota, and continued exclusively in that business until 1929, first using motor vehicles in the year 1916. In 1929 he commenced long distance operations by motor vehicle. On June 1, 1935, plaintiff owned outright a pick-up truck which he used to transfer freight from customers to his garage, where the freight was transferred to larger trucks. He claims to have been the owner of a truck and trailer which apparently was in the name of one Arlo Davis. This truck was operated through the State of Wisconsin. He used twelve or fourteen trucks under oral leases, and claimed to have an equity in four pieces of this equipment, created by the advancement of money to the owner-operators for payment on their respective finance contracts covering equipment. There is no evidence of any lien on these trucks. Open notes were taken to cover such advancements. Davis secured authority to operate in Wisconsin in September, 1934, and filed public liability and property damage insurance with the Wisconsin authorities in connection with his permit.

The Davis equipment was operated principally in Wisconsin, occasionally in Iowa, never in North Dakota, and plaintiff was unable to state that it was ever used in Illinois. Plaintiff's name did not appear on this equipment. Davis

transferred whatever title he had in this equipment to the plaintiff early in the year 1936, and plaintiff operated this equipment until February, 1937. However, at the time of the hearing in 1937, this equipment was not in use and had not been in use for two months prior thereto. There was no explanation given as to the discontinuance of its use. Davis severed his connections with Moore at the time of the transfer of title of said truck. While he was operating the truck he was paid a salary of $175 per month. However, he was to pay any necessary help.

Under plaintiff's arrangements with owner-operators other than Davis, when sufficient freight had been secured by him he would select a truck owner having operating permits in the states to be entered in the transportation of the shipments. The truck owners used by plaintiff were generally paid 90 per cent of the total freight charges collected, although in some instances they were paid on a trip, mileage, or hourly basis. It may be generally stated that the plaintiff received ten per cent of the gross freight charges collected for his services. The owner-operator hired and paid such extra drivers and helpers as were needed, paid all operating expenses, secured in their own names such state authorities as were held, and were themselves responsible for any fines or penalties for violations of state laws, for damage done to their vehicles, or for injuries to third persons. Plaintiff's name did not appear on the trucks. At all material times, plaintiff solicited shipments, both truck-load lots and less, for movement over the St. Paul, Minneapolis and Chicago routes, operations over which were conducted several times per week, and truck loads over other routes which were irregularly served, except that he would accept 5,000-pound cargoes over the latter routes.

Plaintiff estimated that he handled 20,000,000 pounds of freight during each of the years 1935 and 1936. He instructed the driver where to get the load, where to deliver it, and, in most instances, the route to follow, and made certain the truck was in suitable condition to make the trip. He adjusted claims and carried cargo insurance, but charged the truckers 1.5 per cent of their earnings on those shipments to cover such insurance. He made advances to

truckers to cover their expenses, which were later repaid by the truckers. The shipments in many instances were covered by plaintiff's freight bills. However, at times, truck-owners moved shipments on their own billing. The plaintiff maintained a general office in the City of St. Paul and had an arrangement with a filling station operator at Chicago, Illinois, to handle such business as he might have in the State of Illinois. The arrangement at Chicago was not for the exclusive benefit of the plaintiff. The filling station operator had the privilege of either turning the business over to the plaintiff, or to such of the owner-operators hauling for the plaintiff as were permitted to accept shipments on their own account. Plaintiff advertised in telephone books and periodicals as a common carrier. In 1936 plaintiff signed written leases with many of the owner-operators. However, his relations with them were conducted in the same manner as previously. The written leases contain the following provisions:

"Provided, further, that the said lessee (plaintiff) shall be under no liability or obligation whatsoever to make any improvements or repairs upon said motor vehicles, to pay for any licenses, permits, certificates or insurance necessary or convenient to the operation of the same, nor shall the said lessee be liable for any accidents or damage sustained or suffered by the said motor vehicles or third persons, whether the same be due to the negligence of lessee or otherwise."

The plaintiff had no state permits authorizing his operation in any of the states covered by the applications during the year 1935. It appears that in Illinois no permit was required for the operation of trucks during the year 1935.

Some of the owner-operators applied for authority under the "grandfather" clause. These applications were drafted in the office of the plaintiff, with his knowledge.

The plaintiff was registered under the National Industrial Recovery Act and the Code of Fair Competition for the trucking industry for the State of Minnesota prior to June 1, 1935.

The Commission found that the applicant had failed to establish that he was, on the statutory date and continu-

ously ever since, in bona fide operation in interstate or foreign commerce as a common or contract carrier by motor vehicle between any points whatsoever, and that the applications should be denied. The denials of the applications were apparently based on the grounds that the plaintiff had failed to meet the burden of proof imposed upon him with respect to his applications for authority under the "grandfather" clause; that the operations of the owner-drivers could not be used in determining plaintiff's operating rights, and that any rights which he might be entitled to necessarily rested on the operation of the Davis equipment; that there was a failure of proof to show what shipments, if any, were transported in that equipment; that if such operation of the Davis equipment could be considered bona fide, there was a substantial interruption thereof after the statutory date.

The first contention made by the plaintiff requires no discussion, since the plaintiff has failed to point out in his oral or written arguments (and we have been unable to find from a search of the record) any matter foreign to, or outside the record which has been found as a fact or suggested as a basis for any conclusion thereon by the Commission.

Although it is generally claimed by the plaintiff that the findings of the Commission are without support in the evidence, and are arbitrary, in his complaint he attacks the findings in certain instances. From a search of the record we have been unable to find any specific instance where the findings are without support in the evidence.

The plaintiff has testified that all equipment used by him on the statutory date, save the Davis equipment, was operated under lease, and he claimed to have had an equity in some four or five pieces of such equipment. The plaintiff advanced money to these truckers on occasion, taking their unsecured notes for the advances which were subsequently deducted from the earnings of the truckers, but the plaintiff never had a lien or mortgage on any of said equipment. While the plaintiff carried cargo insurance, and in the first instances paid for it, he charged the same back against the trucker and deducted the amount thereof from the earnings

of the trucker. The truckers, at their own expense, furnished public liability and property insurance, and also workmen's compensation insurance. The billing of freight was not in all instances in the name of the plaintiff. At times the truck owners moved shipments on their own billings. The plaintiff advanced money to truckers for supplies. These advances were later deducted by the plaintiff from the earnings of the trucker. The plaintiff maintained an office and had one employee in St. Paul, on the date of the hearing. He had an arrangement with a service station operator at Chicago to accept telephone calls which had to do with the Chicago business.

The Court's review of the evidence, both in cases under the Motor Carrier Act and under the Interstate Commerce Act, is limited to the question of whether there is substantial evidence to support the findings of the Commission. The Court is not permitted to question the soundness of the reasoning upon which the conclusions of the Commission were reached, nor the weight of the evidence. These matters are for the consideration of the Commission.

The Commission's findings will be disturbed only when they are arbitrary and without support of substantial evidence. See: Ohio Bell Telephone Company *v.* Public Utilities Commission of Ohio, 301 U. S. 292; Loving, et al. *v.* United States, et al., 32 Fed. Supp. 464 (D. C. West. Dist. Okla.), affirmed per curiam, 310 U. S. 609; United States, et al. *v.* Maher, etc., 307 U. S. 148. Even though the evidence might support a different inference the Court is not permitted to substitute its judgment for that of the Commission. See Swayne & Hoyt, Ltd., *v.* United States, 300 U. S. 297, 307.

A careful examination of the record made before the Commission satisfies this Court that the findings of the Commission are founded upon substantial evidence.

The plaintiff argues that

"The finding that petitioner allegedly had not leased equipment and that it had not been operated under his direction and control fails utterly and completely to sustain the Commission's conclusion that for such reason petitioner was

not a common carrier in that the statute imposes no such conditions",

and that the Commission erred as a matter of law in its construction of the Motor Carrier Act in denying petitioner's claim for "grandfather" certificates.

The plaintiff invokes the "grandfather" clause as the basis for his right to certificates. To entitle him to a certificate under that clause he must show that he "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935" and continuously thereafter. In determining whether or not plaintiff is entitled to certificates under the "grandfather" clause, Section 203, subdivision (a) (14) (49 U. S. C. A. 303 (a) (14)), must be read in connection with Section 206 (a) of the Act.

Section 203 (a) (14) defines a common carrier by motor vehicle under the Motor Carrier Act as

"any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, * * *"

This section was amended in the Transportation Act of 1940. The words "by lease or any other arrangement" were omitted in the new Act.

The provision of Section 206 (a) that no "common carrier by motor vehicle * * * shall engage in any interstate * * * operation on any public highway" without a certificate "indicates that indirect operations of forwarders through independent carriers are not within the scope of the Act". Acme Fast Freight, Inc., et al. *v.* United States, et al., 30 Fed. Supp. 968 (So. Dist. N. Y.) affirmed per curiam, 309 U. S. 638.

In ascertaining the rights of an applicant under the "grandfather" clause, many elements must be considered. The bona fides of the operation, the regularity and extent of the operation, the equipment in use, whether owned or leased, the applicant's control or lack of control over the operators and equipment, the relationship existing between

applicant and operator, the lawfulness of the operations in the different states, and the applicant's responsibility to the public and shipper, are all matters which should be inquired into and appraised.

In the instant case we are dealing with the question of whether the plaintiff qualified under the statutory definition in the Motor Carrier Act of a common carrier, and not with questions arising from the relationship of master and servant, or principal and agent. It may be said that the plaintiff held himself out on the statutory date as a common carrier by motor vehicle, but the question remains, did he perform the transportation. To qualify as a common carrier by motor vehicle, he must actually have performed the carriage, either by equipment of his own, or such as he had under lease. He must have had control, in either event, of the equipment. Loving, et al. *v.* United States, et al., supra. His operation must have been bona fide, and in compliance with the laws of the states through which his equipment passed. McDonald *v.* Thompson, et al., 305 U. S. 263. There must have been responsibility to the public and the shipper without avoidance thereof.

This Court expressed itself in O'Malley *v.* United States, et al., 38 Fed. Supp. 1, in respect to the tests applied by the Commission to "grandfather" applications, as follows:

"The Commission appears to have consistently ruled that to be a carrier by motor one must have direction and control of the motor vehicles which do the carrying for him, so that he is responsible both to the shipper and to the general public for their operation; or, in other words, that with respect to the motor vehicles which he uses he must stand in the relation of proprietor by virtue of ownership, lease, or other arrangement, and that mere user, in the absence of control or direction, even though exclusive, is not enough." (Citing cases.)

The construction which the Commission has placed upon the words, "by any other arrangement" in Section 203 (a) (14) of the Act has met with the approval of the Court. See Acme Fast Freight, Inc., et al. *v.* United States, et al., supra.

The purpose of the Motor Carrier Act is regulatory. The intention of the Congress in inserting the "grandfather" clause in the Act was, no doubt, for the benefit of carriers who had been in bona fide operation previous to and on the statutory date, and continuously thereafter, up and to the time of hearing on the application for authority. To obtain authority to operate under that clause, the Act requires that the applicant establish the fact that he was in bona fide operation at the material times. The Commission has said by its orders that the plaintiff failed to meet the requirements of proof, and with this conclusion we do not disagree.

As to the plaintiff's operation of the Davis equipment, there is evidence that the same was not operated by the plaintiff for a period of two months prior to the time of the hearing. No explanation of the discontinuance of the operation of that equipment was given. No "grandfather" claim can be based on that type of operation. See United States, et al. *v.* Maher, etc., supra.

It is our conclusion that the findings of the Commission are supported by substantial evidence, that there is no evidence of arbitrary action, and that there has not been an improper construction of the Motor Carrier Act. The bill of complaint will be dismissed.

Dated this 17th day of November, 1941.

JOHN B. SANBORN,
United States Circuit Judge;
ROBERT C. BELL,
United States District Judge;
GEORGE F. SULLIVAN,
United States District Judge.

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CHARLES ELMORE CRO
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Supreme Court of the United States

October Term, 1941

Docket No. 1074.

ERNEST E. MOORE, Doing Business as MOORE MOTOR FREIGHT LINES,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

ANSWER TO MOTION TO AFFIRM.

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INDEX.

	Page
Statement of Facts	1
Argument	5

AUTHORITIES CITED.

Dixie Ohio Common Carrier, 17 M. C. C. 735 ..... 5, 7

Lubetich v. United States, No. 322, Decided by United States Supreme Court January 19, 1942 8

O. D. L. Forwarding Corporation Contract Carrier Application, 26 M. C. C. 481 ..... 6, 7

United States v. Rosenblum, No. 52, Decided by United States Supreme Court January 19, 1942 8

United States v. Margolies, No. 53, Decided by United States Supreme Court January 19, 1942 8

Supreme Court of the United States

October Term, 1941

Docket No. 1074.

ERNEST E. MOORE, Doing Business as MOORE MOTOR FREIGHT LINES,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

ANSWER TO MOTION TO AFFIRM.

Pursuant to Rule 12, paragraph 3, and Rule 7, paragraphs 3 and 4, the appellees moved that the decree of the District Court be affirmed, and the appellant hereby answers said Motion, and sets forth the following reasons why the motion to affirm should be denied.

STATEMENT OF FACTS.

The appellant introduced evidence before the Interstate Commerce Commission to establish that he started in the transfer business in 1906 and in long distance hauling by trucks in 1929, using his own equipment at that time (R. 42) and operating over the routes and in the territory as set forth in his applications for a certificate before the Interstate Commerce Commission. That from January to June, 1935, he operated over the routes applied for about three or four times a week, using twelve to fourteen pieces of leased equipment, and one tractor and trailer, which he owned but which was in the name of one Arlo Davis, and a pick-up truck, which he used to transfer freight from customers to his garage, where the freight was transferred to the larger trucks (R. 48, 59, 90). That the twelve or fourteen pieces of equipment that he used, he had under verbal leases and claimed to have an equity in this equipment by advancing drivers money to pay finance companies for the same. That he paid for the use of this leased equipment by the hour, by the trip, or on percentage basis. That he had complete control of collection and handling of freight. That in 1936, he had written leases with the various truckers that were operating for him, said written leases being obtained as a result of instructions from the Interstate Commerce Commission that written leases were required. That the leases were enterd into for a period of ten (10) years, with a thirty-day cancellation clause (R. 65, 66). That he hauled commodities for from 70 to 75 shippers, with whom he did business. That he published his own tariffs; and had a permit to operate in Minnesota

in the year 1933, under his own name, and a permit in Wisconsin in the years 1934 and 1935 for the truck which he owned and which he was operating under the name of Arlo Davis (R. 83, 84, 101, 103). That the State of Iowa was cognizant that he was operating through that State under leased equipment. That Illinois required no permits and had no regulation of motor vehicles in 1935 and prior thereto. That owner-operators who were hauling for appellant (some of whom filed applications for certificates themselves) stated in their applications that they were, in fact, hauling for the appellant (R. 130, 189, 208).

That in his exceptions to the proposed report of the Examiner (which was filed with the Interstate Commerce Commission on October 19, 1938) your appellant set forth the names, docket number and status of some of the owner-operators from whom the appellant leased equipment, as follows:

Trucker	*Docket No.*	*Status*
Tony Bullock	MC 80379	Application withdrawn
E. C. Knodt	MC 46388	Application withdrawn
Harry H. Schmidt	MC 20390	Show Cause Order issued and application dismissed for want of prosecution.
W. N. Olson	.....	The I. C. C. has no record of an application.
Ora D. Smith	MC 92443	Application withdrawn
H. W. Hockema	MC 73836	Show Cause Order issued and application dismissed for want of prosecution.
Gard Gibson	MC 36809	Application withdrawn
Anton Rechtzigel	MC 75921	Application withdrawn
Geo. Schumann	MC 51007	Show Cause Order issued and application dismissed for want of prosecution.
Arlo Davis	.....	The I. C. C. has no record of an application.

That the appellant paid Arlo Davis' taxes and registration fees, and paid him a salary for driving appellant's truck (R. 189, 193) That appellant instructed his drivers what routes to take (R. 227). That in 1929, 1930 and 1931, appellant had twelve trucks that he owned himself. That he owned nine trucks in 1932, seven or eight in 1933, and two in 1934. That in the years 1935 and 1936 appellant hauled approximately twenty million pounds of freight per year. Your appellant advertised in telephone books, periodicals, etc. He carried cargo insurance on all freight; had a garage and mechanic to keep the equipment in condition; paid for gas and oil used by the drivers, and charged it to them (R. 267, 269, 271, 274, 275). Practically all of the freight moved under bills of lading made out by appellant, and freight bills were issued with appellant's name printed on the same (R. 269, 271, 274, 275, 303).

Appellant advanced money for meals for the drivers of the trucks, and saw that their equipment was in proper shape when it left his garage, and maintained a mechanic for that purpose. Appellant has been operating his office and garage at 566 Cedar Street in St. Paul since 1906, is widely known among the shippers of freight; is absolutely responsible for the shipments of freight; made out his own freight bills; listed all of the business, paid claims, carried cargo insurance, instructed the drivers where to deliver the freight, assisted them in purchasing their gasoline, tires and financing their trucks, and held himself out to the shipping public as the person who was, in fact, responsible for the shipment of freight.

Appellant was also a member of, and registered under the N. R. A. and the Code of Fair Competition for the trucking industry prior to June 1, 1935.

ARGUMENT.

We earnestly maintain that the District Court of the United States erred in sustaining the order of the Interstate Commerce Commission, which denied any rights whatsoever, to operate as a common carrier, contract carrier, or broker in Interstate Commerce.

In order to determine whether or not a carrier had the dominion and control over the vehicles used in transporting freight, the Interstate Commerce Commission, in the case of Dixie Ohio Common Carrier, 17 M. C. C. 735, applied a yard stick in determining whether there was such dominion and control. In that case, the Commission said:

> "Applying the principles so indicated to the present case, the evidence shows that the traffic transported in the vehicles of the owner-operators moved on bills of lading issued by applicant, which assumed full responsibility as a common carrier therefor. The consignors of the shipments dealt only with applicant. The vehicles, while in its service, were registered under applicant's operating authority and had applicant's name printed, or otherwise shown, thereon. Insurance covering them was arranged for and paid for by applicant. Its dispatchers or other employees directed the time and manner of the loading and unloading of the vehicles, and also directed their movement over applicant's route. There was continuing authority to issue such directions. The conclusion follows, therefore, that as to its operations in which such vehicles were employed, applicant was a common carrier by motor vehicle as defined in section 203 (a) (14) of the act."

In the O. D. L. Forwarding Corporation Contract Carrier Application, 26 M. C. C. 481, the Commission apparently relaxed its yard stick rule in this case, when it decided that, although the applicant did not have leases, only paid for each trip, only had operating authority in Indiana, although it was operating in Ohio, Wisconsin, Illinois and Missouri, did not have any vehicles at all, merely put an unexecuted lease in evidence, which could be terminated by five days notice, but because the operator carried public liability, property damage, cargo and workmen's compensation insurance, and that the owner operators had to employ drivers that were acceptable to the applicant, and that the employees were paid by the owner of the equipment, that upon these facts, and the fact that the applicant entered into an agreement with the shippers to assume full responsibility for the safe delivery of the freight tendered to it, and maintained a claim department to pay proper claims, that it assumed full control and management of the trucks used in its service. On these facts the Commission granted the applicant a certificate.

In the present case we believe the record shows a much stronger dominion and control. Appellant had leases which ran for ten years, and had to have a thirty-day notice of cancellation; he paid for gasoline and oil, for the cargo insurance, helped finance the men in purchasing these trucks, advanced money to them; did all of the billing under his own name; had all of the customers; inspected the trucks before they left the garage; had a mechanic to see that they were in mechanical condition; instructed the drivers where to go, and what freight to pick up on their return trip, and for this the appellant was receiving ten

per cent, when he paid the owner-operators on a percentage basis. A much larger percentage, which we understand was approximately 35% was retained by the O. D. L. Forwarding Corporation, which, of course, would allow them to pay for insurance on the trucks, but regardless of that fact, we maintain that the status of the appellant should not be based on the question of insurance solely, but that his entire system of operation should be taken into consideration, and that Congress intended, when it passed the Act that every possible consideration should be given to this evidence, for the purpose of keeping legitimate businessmen in business; that the Act was passed to regulate transportation and not to destroy it.

In Dixie-Ohio case and the O. D. L. Forwarding case (supra) the Commission has taken the position that the question of who is to receive a certificate for the transportation of freight is determined largely by who has the responsibility, first to the shipper, and then to the public, and has gone far, especially in the O. D. L. Forwarding case, to hold that the man who contacts the shippers, issues the bills of lading, collects for the shipment of freight, pays for the damages, determines the route over which the freight shall be shipped, should be entitled to the certificate, and, has to all intents and purposes, dominion and control over the vehicles that the freight is being transported in, and that the person who owns the truck and, possibly carries insurance, and pays the permit fees to the various states, and actually and physically operates the truck, but has no connection otherwise with the shipping public, is not entitled to a certificate.

We maintain that this is exactly the situation here. The owner-operators whom appellant had leases with, although

some of them filed applications, either withdrew the same, or did not ask for a hearing, have not continued their operations over the routes and territories applied for by the appellant, except under the lease agreements that he has made with them, and has never claimed any rights since the filing of their applications, and the same have either been withdrawn or abandoned.

At the time that the appellant's case was heard in District Court, the Supreme Court of the United States had not determined the case of United States v. Rosenblum, No. 52, United States v. Margolies, No. 53, and Lubetich v. United States, No. 322, all decided in January 19, 1942.

We earnestly urge that the above cases were very similar to appellant's case, and that in failing to grant any rights whatsoever to the appellant, the Interstate Commerce Commission created a situation where a common carrier of freight did not receive a certificate while the owner-operators of trucks who were hauling for him either failed to make application for certificates or abandoned the same, which results in no one having an operation that, in fact, did exist, and which was a very substantial motor carrier operation over a long period of years.

In the Rosenblum case (supra) the Court said:

> "We think it clear that Congress did not intend to grant multiple 'grandfather' rights on the basis of a single transportation service. Presumably the common carriers which appellees served were entitled to common carrier 'grandfather' rights over the entire line. It was the common carrier who offered the complete transportation service to the general public and the shipper. To hold that appellees, who performed part of that complete transportation service for those common carriers under agreements with them, acquired

contract carrier 'grandfather' rights over the same line entitling them also to serve the public is to ascribe to Congress an intent incompatible with its purpose of regulation. The result would be to create in this case two services offering transportation to the public when there had been only one on the 'grandfather' date, without allowing the Commission to determine if the additional service was in the public interest. And, instances can readily be imagined where a single common carrier might utilize the services of several operators such as appellees. Automatically to grant contract carrier rights to such operators might result in such a wholesale distribution of permits as would defeat the very purpose of federal regulation."

We earnestly maintain that both the Interstate Commerce Commission and the District Court erred in their decision in this matter. That substantial rights of the appellant, which have been developed by him by a life-time of hard work, will be destroyed, and that the appellant should have an opportunity to present his views by brief and argument before the Honorable Court.

We respectfully submit that the Motion of the appellees should be denied.

THOMAS WALSH,
Attorney for plaintiff-appellant,
1028 Minnesota Building,
St. Paul, Minnesota.

In the District Court of the United States for the District of Minnesota

Civil Action No. 253

ERNEST E. MOORE, DOING BUSINESS AS MOORE MOTOR FREIGHT LINES, PLAINTIFF-APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, and Rule 7, paragraphs 3 and 4, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's petition to annul, set aside and enjoin an order of the Interstate Commerce Commission entered March 13, 1941. The Commission's order denied appellant's application for a certificate as a common carrier or in the alternative for a permit as a contract carrier by motor vehicle under the grandfather provisos of Sections 206 (a) and 209 (a) of the Motor Carrier Act, 1935. The evidence before the Com-

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mission showed, and the Commission found, that appellant's claim to grandfather authority was based upon operations conducted through equipment owned and operated by other persons.[1] Appellant secured orders for transportation and then negotiated with truckers who held appropriate state operating rights to perform the carriage service; he held no such rights in his name, assumed no responsibility for operating expenses, and expressly contracted against any liability to the general public resulting from the performance of the transportation service. On this and other evidence the Commission found that the operations relied upon to support appellant's claim to grandfather rights were insufficient to establish in him a bona fide carrier status, either common or contract, on and continuously after the applicable grandfather date.

The decree of the court below sustaining the Commission's order should be affirmed without argument because the appeal therefrom presents no substantial question. There are three assignments of error: (1) That the Commission's order violates the Fifth Amendment because it "is premised upon matter and information foreign to and outside of the record;" (2) that the Commission's order proceeds upon an erroneous construction of the Act; and (3) that the findings are not supported by evidence.

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[1] Appellant owned a half interest in one piece of equipment on the critical date but operation of it was discontinued in February 1937.

1. The claim that the Commission gave consideration to matters outside the record is not supported by any allegation of the complaint; the assertion was first made in the course of argument and the basis for it was never explained. In rejecting the contention the district court said:

> The first contention made by the plaintiff requires no discussion, since the plaintiff has failed to point out in his oral or written arguments (and we have been unable to find from a search of the record) any matter foreign to or outside the record which has been found as a fact or suggested as a basis for any conclusion thereon by the Commission.

2. The law of the case is settled by the decisions of this Court. The Commission held on the evidence that appellant's operations did not satisfy the definition of a "common carried by motor vehicle" contained in the Act. Its conclusion is supported by the decision in *Acme Fast Freight* v. *United States*, 30 F. Supp. 968, affirmed per curiam 309 U. S. 638. The absence of equipment for over-the-road transportation and of substantial responsibility to the general and shipping public for the operations conducted suggests a possible status as broker or forwarder but plainly negatives a status as carrier, as that term is narrowly defined in the Act. The Commission's conclusion finds support also in this Court's decisions in *United States* v. *Rosenblum*, No. 52, this Term, *United States* v. *Margolies*, No. 53, this Term, *Lubetich* v. *United States*,

No. 322, this Term, all decided January 19, 1942. In those cases the applicants were owner-operators who transported freight, usually over-flow freight, for carriers; and this Court affirmed the Commission's ruling that such operators did not have a status as carriers under the Act. Appellant claims here to have occupied a position analogous to that of the carriers in the cited cases and to have conducted a carrier service through the medium of owner-operators. The Commission found that appellant did not have direction and control over, or responsibility for, the operation which was essential to the creation of a carrier status. Its conclusion was based upon considerations consistent with those which determined its judgment in the *Rosenblum, Margolies,* and *Lubetich* cases. It follows, as the court below held, that the Commission's construction and application of the law was correct and that its findings support the order.

3. The appellant's final assignment of error charges insufficiency of the evidence to sustain the Commission's findings. The question is not substantial and there is no merit in the arguments advanced by appellant. In the hearing before the Commission the issue was whether or not appellant's operation on the grandfather date was that of a carrier. Evidence was fully adduced on this point and the Commission duly considered and weighed it. The controverted matters of fact raised in the proceeding were settled by the Com-

mission's decision. *United States* v. *Maher*, 307 U. S. 148, 153–154. While appellant made a general claim in the district court that the findings of the Commission were contrary to the evidence, that court said:

> From a search of the record we have been unable to find any specific instance where the findings are without support in the evidence.
>
> * * * * *
>
> A careful examination of the record before the Commission satisfies this court that the findings of the Commission are founded upon substantial evidence.

For the foregoing reasons, it is evident that the errors assigned by appellant are without substance. It is respectfully submitted that the judgment of the district court should be affirmed.

CHARLES FAHY,
Charles Fahy,
Solicitor General,

DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel,
Interstate Commerce Commission.

Receipt of a copy of the above motion to affirm is acknowledged this 27 day of Feb. 1942.

ERNEST A. MICHEL,
Ernest A. Michel,
THOMAS W. WALSH,
Thomas W. Walsh,
Counsel for Plaintiff-Appellant.

U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 1074. MOORE, DOING BUSINESS AS MOORE MOTOR FREIGHT LINES, *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the District of Minnesota. April 13, 1942. *Per Curiam:* The mo-

tion to affirm is granted and the judgment is affirmed. *United States* v. *Maher*, 307 U. S. 148, 153–154; *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50; *Lubetich* v. *United States*, 315 U. S. 57. *Messrs. Ernest A. Michel* and *Thomas Walsh* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for respondents. Reported below: 41 F. Supp. 786.